

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 SOUTHERN DIVISION
11

12 GRETA REAFSNYDER,) No. SACV 11-659-CW
13)
14 Plaintiff,) DECISION AND ORDER
15 v.)
16)
17 MICHAEL J. ASTRUE,)
18 Commissioner, Social)
19 Security Administration,)
20)
21 Defendant.)
22 _____)

23 The parties have consented, under 28 U.S.C. § 636(c), to the
24 jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks
25 review of the Commissioner's denial of disability benefits. Defendant
26 has moved to dismiss the complaint for lack of jurisdiction due to
27 failure to exhaust administrative remedies under Fed. R. Civ. P.
28 12(b)(1). For the reasons discussed below, the motion is **GRANTED**.

24 **I. BACKGROUND**

25 The relevant facts are not in dispute.

26 On July 29, 2008, Plaintiff filed a claim for supplemental
27 security income ("SSI") and disability insurance benefits ("DIB")
28 alleging disability since July 23, 2004. Her claims were denied

1 initially, and Plaintiff then filed a timely request for
2 reconsideration. [Motion to Dismiss, ("MTD"), Declaration of Yolanda
3 Vargas ("Vargas Decla") at 2.]

4 On August 28, 2009, the reconsideration request was denied, and,
5 according to the electronic case processing system of the Office of
6 Disability Adjudication and Review ("ODAR"), a copy was mailed to both
7 Plaintiff and her attorney.¹ [Id. at 3.] The denial notice gave
8 Plaintiff sixty (60) days within which to file a request for an
9 administrative hearing. [Id.] The ODAR electronic case processing
10 system does not show that either copy was returned by the U.S. Postal
11 service as "undeliverable." [Id.]

12 Plaintiff's Request for Hearing was submitted approximately one
13 year after it was due, on about September 28, 2010. [Varga Decla., Ex.
14 2.] Along with the request, Plaintiff submitted declarations from
15 herself and her attorney asserting under penalty of perjury that
16 neither received the notice of the reconsideration determination.
17 [Id.]

18 On November 5, 2010, an Administrative Law Judge ("ALJ") issued a
19 notice of dismissal on the basis that the request for hearing was not
20 filed in a timely manner and that Plaintiff's declarations failed to
21 establish good cause for the late request. [Varga Decla., Ex. 3.] The
22 dismissal noted Plaintiff had the same address since 2005; that she
23 timely responded to most, if not all, prior correspondence; and there
24 was nothing in the record to suggest she had a limitation that would
25 prevent her from making a timely request. [Id.] Furthermore, the ALJ
26 noted that other circumstances weighed against a finding of good

27 ¹ There is no dispute with respect to whether the correct
28 addresses for Plaintiff and her attorney were used.

1 cause: Plaintiff abandoned a prior claim for benefits after the
2 initial denial, and she waited an inordinately long time between
3 receiving the initial determination in this case and inquiring about
4 her claim. [Id.]

5 Plaintiff requested review of the ALJ's decision. On March 3,
6 2011, the Appeals Council denied review. [Varga Decla., Ex. 4.]

7 This action followed. In the Complaint, Plaintiff seeks either a
8 finding that she is disabled or a remand for a hearing on the merits
9 of her disability claim on the basis that: the record supports a
10 finding of disability, the good cause finding was in error or, in the
11 alternative, her due process rights were violated by the denial of a
12 hearing. [See Docket no. 1.]

13 II. DISCUSSION

14 Defendant contends this court lacks jurisdiction over the
15 complaint because there has been no "final decision" after a hearing,
16 and Plaintiff has thus failed to exhaust her administrative remedies.
17 Plaintiff essentially urges that the exhaustion requirement should be
18 waived in this case.

19 A. **Final Decision**

20 Judicial review of the denial of a DIB or SSI benefits claim is
21 authorized and limited by 42 U.S.C. § 405(g), which provides, in
22 relevant part: "Any individual, after any final decision of the
23 Commissioner of Social Security *made after a hearing* to which [s]he
24 was a party . . . may obtain a review of such decision by a civil
25 action" 42 U.S.C. § 405(g) (emphasis added); see also Hoye v.
26 Sullivan, 985 F.2d 990, 991 (9th Cir. 1992). Relevant here, the final
27 decision requirement is an exhaustion requirement, which may be
28 waived. Cassim v. Bowen, 824 F.2d 791, 794 (9th Cir. 1987) (citing

1 Hironymous v. Bowen, 800 F.3d F.2d 888, 894 (9th Cir. 1986) and
2 Mathews v. Eldridge, 424 U.S. 319, 328-30, 96 S. Ct. 893, 899-900, 47
3 L. Ed. 2d 18 (1976)) (final decision includes two elements:
4 presentment and exhaustion). Absent waiver of the exhaustion
5 requirement, there is no other avenue for judicial review of a denial
6 of a claim for benefits. 42 U.S.C. § 405(h) ("No . . . decision of
7 the Commissioner of Social Security shall be reviewed by any person,
8 tribunal, or governmental agency except as herein provided.")

9 By the terms of the Act, then, a dismissal without a hearing is
10 not a "final decision" subject to judicial review. See Hoye, 985 F.2d
11 at 991; Boettcher v. Sec'y of Health and Human Servs., 759 F.2d 719,
12 720-21 (9th Cir. 1985); Bacon v. Sullivan, 969 F.2d 1517 (3rd Cir.
13 1992) (holding that the decision by the Social Security Administration
14 not to consider an untimely request for review is not a "final
15 decision" subject to judicial review); Sheehan v. Sec'y of Health, Ed.
16 & Welfare, 593 F.2d 323, 327 (8th Cir. 1979) ("If claimant may avoid
17 the timely exhaustion of remedies requirement, any claimant could
18 belatedly appeal his claim at any time and always obtain district
19 court review of an ALJ's decision.").

20 Consequently, because the ALJ here dismissed Plaintiff's hearing
21 request as untimely and found no good cause to rebut the presumption
22 that she received notice of the denial of her reconsideration
23 request,² there is no "final decision," and this court lacks
24

25 ² A request for hearing must be filed within sixty (60) days
26 after the date the claimant receives notice of the previous
27 determination. 20 C.F.R. §§ 404.933(b)(1), 404.901. It is presumed
28 that a claimant received notice within five days of the printed date
of the letter, unless the claimant shows otherwise. 20 C.F.R. §§
404.901, 416.1401. If a hearing is not requested in time, the claimant
may ask for an extension of time to request a hearing supported by a

jurisdiction to consider the complaint, absent a waiver. See Burbage v. Schweiker, 559 F. Supp. 1371, 1372-73 (C.D. Cal. 1983) (dismissing complaint for lack of jurisdiction where ALJ dismissed hearing request as untimely, found no good cause for extension, and appeals council affirmed); Boettecher v. Sec'y of Health and Human Servs., 759 F.2d at 723-24 (finding no waiver after request for hearing dismissed); Scott v. Astrue, 2009 WL 2338085 (D. Or. 2009)(dismissing complaint for lack of jurisdiction when plaintiff asked court to review commissioner's decision that he lacked good cause for untimely request for hearing).

B. Waiver

There is a waiver of the exhaustion requirement when a plaintiff makes a claim that is: (1) "collateral to a substantive claim of entitlement (collaterality), (2) colorable in its showing that denial of relief will cause irreparable harm (irreparability), and (3) one whose resolution would not serve the purpose of exhaustion (futility)." Kildare v. Saenz, 325 F.3d 1078, 1082 (9th Cir. 2003).

A claim is "collateral" to a claim for benefits when the plaintiff does not ultimately seek a benefits award, but rather challenges the Commissioner's failure to follow applicable regulations. Kildare v. Saenz, 325 F.3d at 1082. It is not enough for the plaintiff simply to challenge irregularities in her individual case, id., the complaint must allege a constitutional or statutory

showing of good cause for missing the deadline. 20 C.F.R. §§ 404.911, 416.1411, 404.933(c), 416.1433(c). An ALJ may dismiss a request for a hearing if the request was not filed within the sixty-five day period and the time period was not extended on a finding of good cause. 20 C.F.R. §§ 404.957(c)(3), 416.1457(c)(3). If a claimant seeks to challenge a dismissal made on this basis, she may then do so by requesting the dismissal be vacated on a showing of good cause made within sixty (60) days of the dismissal. 20 C.F.R. §§ 404.960, 416.1460.

1 challenge to a substantive policy of the Social Security
2 Administration, Johnson v. Shalala, 2 F.3d 918, 921 (9th Cir. 1993).

3 Here, the complaint asks the court to find that the ALJ erred in
4 concluding Plaintiff's request for a hearing was untimely and to
5 either: (1) affirmatively find Plaintiff to be disabled or; (2)
6 reverse for a hearing with respect to the merits of her disability
7 claim. [See Complaint (docket no. 7) at 2, 3; see also Opposition to
8 Motion to Dismiss at 7 (Conclusion).] Notwithstanding Plaintiff's
9 allegation that due process was violated because her hearing request
10 was dismissed, at its core this is a quintessential claim for
11 benefits. See Hironymous v. Bowen, 800 F.2d 888, 894 (9th Cir. 1986)
12 (holding that plaintiff's claim seeking to overturn a finding that he
13 was ineligible for benefits is "inextricably intertwined" with claim
14 for benefits, and that waiver of exhaustion requirement was thus not
15 warranted). To the extent Plaintiff purports in her opposition to the
16 motion to dismiss to seek a hearing limited to the issue of whether
17 there was "good cause" for her untimely request - a suggestion she
18 raises only in the body of that pleading [see Opposition to MTD at 3,
19 7] - she does not challenge the constitutionality of the
20 Administration's policies as they relate to good cause determinations,
21 or allege that the Administration is failing to follow law or its own
22 policies in making good cause determinations. Her argument remains
23 simply that the ALJ and Appeals Council erred in making findings of
24 fact in her case, a claim that is "entirely dependent on [her]
25 underlying claim[] for benefits." Kildare v. Saenz, 325 F.3d at 1083
26 (holding plaintiffs did not prove collaterality when they alleged a
27 series of irregularities in individual cases).

28 With respect to the irreparability requirement, while economic

1
2 hardship may constitute irreparable harm, Kildare v. Saenz, 325 F.3d
3 at 1083, other than the conclusory statement that she would suffer an
4 economic loss if she does not receive benefits, Plaintiff makes no
5 allegation of irreparable economic hardship. As Defendant points out,
6 Plaintiff may file a new application for benefits. [Motion to Dismiss
7 at 6.] Plaintiff's vague statement that she "could be" foreclosed
8 from receiving Title II benefits because there "might" be *res judicata*
9 effect to a later-filed claim does not suffice to make a "colorable
10 showing of irreparable harm." Mathews v. Eldridge, 424 U.S. at 331
11 (finding waiver where plaintiff established colorable claim that
12 because of his physical condition and dependency upon the disability
13 benefits, an erroneous termination would damage him in a way not
14 recompensable through retroactive payments).

15 Moreover, Plaintiff's claim of error appears to be without merit.
16 A review of the record reveals the ALJ carefully weighed Plaintiff's
17 claim of good cause against the evidence in the record suggesting she
18 received the denial notice but abandoned her claim as she had
19 abandoned her prior application upon a denial. [Vargas Decla. at 3,
20 Exs. 3, 4.] Under agency policy, the ALJ was not required to hold a
21 hearing with respect to plaintiff's claim of good cause. See HALLEX I-
22 2-60(D)(1). Plaintiff had the opportunity to appeal the ALJ's
23 dismissal and to provide additional evidence to support her good cause
24 contention to the Appeals Council. [Vargas Decla. at 3, Ex. 4.]
25 Plaintiff was thus afforded the "opportunity to be heard at a
26 meaningful time and in a meaningful manner," and she does not
27 establish a colorable constitutional claim denial of which could
28

1
2 conceivably cause her irreparable harm. See Boettcher v. Sec'y of
3 Health and Human Servs., 759 F.2d 719, 722 (9th Cir. 1985) (citing
4 Mathews v. Eldridge, 424 U.S. at 333).

5 Finally, Plaintiff has not established futility. Notwithstanding
6 her use of the words "due process" in the complaint, Plaintiff does
7 not articulate a constitutional challenge to the policies or practices
8 of the Social Security Administration, thus asserting a constitutional
9 claim that is beyond the experience and the expertise of the Social
10 Security Administration to resolve. See Weinberger v. Salfi, 422 U.S.
11 749, 765-66, 95 S. Ct. 2457, (1975). Furthermore, to the extent
12 Plaintiff seeks an award of benefits, there is no "decision" for this
13 court to review, and still something "to be gained from permitting the
14 compilation of a detailed factual record, or from agency expertise."
15 Cassim v. Bowen, 824 F.2d 791, 795 (9th Cir. 1987)(citing Bowen v.
16 City of New York, 477 U.S. 467, 106 S. Ct. 2022, 2032, 90 L. Ed. 2d
17 462 (1986)). And to the extent she seeks remand for a hearing on the
18 merits or on her good cause claim, the policies underlying exhaustion
19 would not be served by remand. Bowen v. City of New York, 476 U.S. at
20 484-85 (exhaustion is not to be excused when a claimant alleges
21 irregularity in the agency's administration of its own regulations,
22 because such errors are fully correctable upon administrative review).

23 In sum, Plaintiff has not established the requisites for a waiver
24 of the exhaustion requirement, and the court thus lacks jurisdiction
25 to consider her complaint.

26 **III. ORDERS**

27 Accordingly, **IT IS ORDERED** that:
28

1
2 1. The motion to dismiss is **GRANTED**.

3 2. This action is **DISMISSED**.

4 3. The Clerk of the Court shall serve this Decision and Order
5 and the Judgment herein on all parties or counsel.

6
7 DATED: November 2, 2011



8
9 CARLA M. WOHRLE
United States Magistrate Judge